No. 06-1235

IN THE

Supreme Court of the United States

PHILIP F. ANSCHUTZ,

Petitioner,

v.

STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, DIVISION OF INVESTMENT, by TREASURER BRADLEY ABELOW,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant extraordinary interlocutory review of a ruling upholding New Jersey's exercise of personal jurisdiction over petitioner, where the ruling simply represents a faithful and unexceptional application of this Court's well-settled personal jurisdiction jurisprudence.

PARTIES TO THE PROCEEDINGS BELOW

During the pendency of state appellate proceedings in this matter, Bradley Abelow succeeded John E. McCormac as New Jersey State Treasurer.

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STATEMENT OF THE CASE

This civil action was brought in New Jersey Superior Court, Mercer County, Law Division. Plaintiff/respondent is the State of New Jersey, Department of Treasury, Division of Investment ("NJT") – one of the fifty largest public or private money managers in the United States, with responsibility for managing pension funds for the retirement plans of over 600,000 active and retired New Jersey employees.

NJT's claims, for fraud and under other state common law theories, arise from substantial losses on its investment in over seven million shares of publicly traded common stock in Qwest Communications International, Inc. ("Qwest"). Pet. App. 5. Named as defendants in NJT's complaint were Qwest, its outside accountant Arthur Andersen, LLC ("Andersen"), and eleven of Qwest's officers and directors (the "Individual Defendants"). Pet. App. 25. Among the Individual Defendants is petitioner Philip F. Anschutz – Qwest's founder, as well as its chairman and controlling shareholder at relevant times. Pet. App. 26.

NJT purchased its shares of Qwest stock between April 1999 and December 2001, at prices that were artificially inflated due to a series of misrepresentations of Qwest's earnings and assets. The misrepresentations, by petitioner Anschutz and other defendants acting in concert with him, were made in public statements, press releases, filings with the United States Securities and Exchange Commission, and conference calls with investors in which a representative of NJT participated. Qwest has since restated its earnings for the years 2000 and 2001. Pet. App. 5. The fraudulent

statements were made in materials disseminated into New Jersey, with the knowledge, purpose, and intent that New Jersey investors such as NJT would purchase Qwest stock in reliance on them. Pet. App. 14-15.

Several of the Individual Defendants, including Anschutz, moved to dismiss for lack of personal jurisdiction. The Law Division denied the motion. On interlocutory appeal, the Appellate Division affirmed on August 18, 2006. Pet. App. 1-20. Its opinion is now reported as *State, Dep't of Treasury, Div. of Inv. ex rel. McCormac v. Qwest Commc'ns Int'l, Inc.*, 387 N.J. Super. 487, 904 A.2d 786 (App. Div. 2006). The New Jersey Supreme Court denied review on December 8, 2006. Pet. App. 50. The instant petition for certiorari followed. Two other Individual Defendants have filed a separate petition for certiorari in this Court, docketed as No. 06-1241, seeking review of the same order.

The underlying claims against Qwest, Andersen, and the other defendants remain pending in the Law Division, with trial expected in 2008.

REASONS FOR DENYING THE PETITION

In a vain effort to transform a garden-variety ruling on personal jurisdiction into grist for interlocutory review in this Court, petitioner Anschutz rewrites not only the factual record and the New Jersey Superior Court's decision in this case, but also the very precedents on which petitioner would rely. The Appellate Division did not in fact adopt any sweeping holding that personal jurisdiction exists "wherever the harm from alleged intentional tort is felt," as petitioner would have it. Pet. at 6. Neither did it hold that "an allegation of conspiracy suffices for personal jurisdiction." *Id.* Rather, the Appellate Division applied the long-settled teachings of this Court to uphold specific jurisdiction over defendants, including petitioner, whose fraudulent communications were disseminated into New Jersey with the knowledge, intention, and expectation that investors like NJT would purchase Qwest securities in reliance on defendants' misrepresentations. That ruling is unexotic and certainly supplies no occasion for extraordinary interlocutory intervention by this Court. All necessary guidance was already supplied by numerous previous decisions of this Court, which the Appellate Division faithfully applied.

As the Appellate Division correctly noted, *see* Pet. App. at 11, neither petitioner nor his co-defendants have raised any argument on appeal that New Jersey's exercise of personal jurisdiction offends traditional notions of "fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945). Personal jurisdiction therefore depends solely on the familiar question whether defendants purposefully established "minimum contacts" in the forum state. *E.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

The facts on which the Law Division and Appellate Division both found that test to be satisfied are aptly summarized in the Appellate Division's opinion. *See* Pet. App. 5-10. In fall 1996, when Qwest was considering a public offering of its stock, Anschutz met with co-defendant Joseph P. Nacchio in New Jersey to discuss Nacchio's joining Qwest as CEO. Once hired in that capacity, Nacchio worked both from Qwest's headquarters in Denver, Colorado, and from its newly opened offices in New Jersey. He consulted Anschutz on every major decision.

Qwest's Chief Financial Officer reported to Nacchio. After Qwest went public, it added an investor relations division, which reported to the CFO. The investor relations division communicated with shareholders and the investment community; press releases and SEC filings were sent to investors who requested information. An NJT representative received that information in New Jersey. These materials included statements by Anschutz, Nacchio, and other defendants touting Qwest's strong revenue growth. In fact, however, Qwest's revenues were fraudulently inflated through such devices as the false reporting of "swap" transactions, in which network capacity was sold and repurchased, with the putative "sales" reported as revenue.

To these facts, the Law Division and Appellate Division applied well-settled law to find that petitioner and the other moving Individual Defendants had sufficient contacts with New Jersey to support specific jurisdiction. Nothing about those rulings departed in any way from this Court's precedents. This is not a case, for example, in which personal jurisdiction is asserted over a defendant who merely placed some commodity in the general stream of commerce, with the commodity then traveling by happenstance to a forum

state where the defendant had never conducted business or transmitted communications. *Cf. World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). Rather, as the Appellate Division correctly observed: "Fraudulent communications are at the center of this controversy. NJT's claims are based on its assertion that it was injured as a consequence of intentionally false statements about the financial health of Qwest that were disseminated in this State and upon which NJT relied in investing public funds." Pet. App. 11.

The Appellate Division's analysis enjoys solid foundations in numerous decisions from this Court, including decisions involving personal jurisdiction in intentional tort cases based on communications purposefully disseminated into a state with the knowledge or intention that they will cause harm within that state. *See, e.g., Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Calder v. Jones*, 465 U.S. 783 (1984). Indeed, petitioner offers no basis on which to distinguish *Calder*, save for an argument that the fraudulent communications at issue here were also transmitted to investors in other states, in addition to New Jersey. Nothing in this Court's personal jurisdiction jurisprudence suggests, however, that a defendant may defeat personal jurisdiction in one forum by the simple artifice of transmitting the same fraudulent representations to residents of other jurisdictions in the course of the defendant's broader tortious endeavors. Even such decisions as *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254 (3d Cir. 1998) – the tortious interference case on which petitioner places such heavy reliance – do not suggest that.[1] Such a rule would have the perverse result that the

1. In *IMO*, the Third Circuit held only that a tortious interference defendant's mere knowledge that its conduct might lead (Cont'd)

greater the geographic scope of the defendant's tortious ambitions, the less amenable to specific jurisdiction the defendant would be in any jurisdiction but the defendant's own domicile.

A writ of certiorari would be inappropriate in any event, because the decisions of the Law Division and Appellate Division are interlocutory, not final. This Court rarely grants certiorari to review interlocutory judgments. *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993). As this Court has recognized, the fact that a party must proceed in litigation is not a ground for such review. *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967). Premature review may involve the Court in unnecessary constitutional adjudication and should therefore be avoided. *See* Justice Brennan, *Some*

(Cont'd)
to harm in the forum state did not suffice, by itself, to establish personal jurisdiction, in the absence of any substantial communications or other conduct directed to the forum state. *See IMO*, 155 F.3d at 265-66. In doing so, it emphasized this Court's pronouncement, in *Keeton*, that the jurisdictional inquiry "'focuses on the relations among the defendant, the forum, and the litigation.'" *Id.* at 265 (quoting *Keeton*, 465 U.S. at 780). Under that standard, the fraudulent communications disseminated in New Jersey amply support specific jurisdiction over claims arising from NJT's reliance on those very statements, which were transmitted with the very purpose of inducing such reliance. Indeed, the facts of this case would comfortably satisfy even the three-part test articulated in *IMO*. *See* 155 F.3d at 265-66. The specific transmittal of the fraudulent statements to New Jersey and NJT, with the intention of inducing purchases of Qwest stock by NJT and other New Jersey investors, amply supports a finding that the tortious conduct was aimed at the forum state, such that the forum state can be said to be the "focus" of the tortious activity at issue.

Thoughts on the Supreme Court's Workload, 66 JUDICATURE 230, 231-32 (1983). Accordingly, as a general rule, this Court will not issue a writ of certiorari to review an interlocutory decree, unless it is necessary to prevent extraordinary inconvenience and embarrassment to the conduct of the case. *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893). There is no such necessity here. Discovery is still underway in the Law Division, and the Appellate Division's opinion specifically notes that information coming to light as discovery progresses may bear on personal jurisdiction. Pet. App. 20. Petitioner will be free to pursue appellate relief after final judgment. Review at this stage is both unnecessary and premature.

CONCLUSION

For the reasons given, respondent respectfully requests that the honorable members of this Court deny the instant petition for a writ of certiorari.

Respectfully submitted,

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